Supreme Court of the United States

OCTOBER TERM, 1941.

No. 841.

SUSAN G. REEVES, PETITIONER,

VS.

WILLIAM BEARDALL, AS EXECUTOR OF THE LAST WILL AND TESTAMENT OF SUSAN J. GRAHAM, DECEASED, RESPONDENT.

BRIEF OF RESPONDENT.

CHARLES P. DICKINSON,
P. O. Box 752, Metcalf Building,
Orlando, Florida,
Attorney for Respondent.

INDEX

Cases Cited

Rules of Civil Procedure Cited

Statutes

Textbook

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 841.

SUSAN G. REEVES, PETITIONER,

VS.

WILLIAM BEARDALL, AS EXECUTOR OF THE LAST WILL AND TESTAMENT OF SUSAN J. GRAHAM, DECEASED, RESPONDENT.

BRIEF OF RESPONDENT.

STATEMENT.

Petitioner filed suit in the District Court, Orlando Division, Southern District of Florida, on three separate and distinct causes of action in July, 1940.

The first count was on a promissory note pure and simple and separate and distinct from everything else, and was a common law action under the old procedure (Tr. 1).

The second count was for specific performance of a contract alleged to be made between the plaintiff, Susan G. Reeves, petitioner herein, and Susan J. Graham, the deceased, of whose estate the respondent is executor,

wherein it is sought to enforce the provisions of a contract between those parties to let the Will of Susan J. Graham dated May 1, 1931, remain in full force and effect. This is a chancery action under the old procedure and is a separate and distinct cause of action from the first count (Tr. 2).

The third count is brought against a third party, William M. Hamer, and in which third count William Beardall as executor of the Will of Susan J. Graham is also a party, in which the plaintiff as the sole heir and entitled to all of the estate of Susan J. Graham, asks for an accounting against William M. Hamer who, it is claimed, has some of the property of the estate of Susan J. Graham and is strictly a suit for an accounting against Hamer. Beardall is a party to that count only because it is claimed that he is not doing his duty in collecting in the estate. This is a distinct and separate cause of action from the other two and under the old procedure is strictly a chancery action (Tr. 3-6).

The District Court sustained motion to dismiss as to Count Two and allowed amendment (Tr. 30 for Motion to Dismiss and Tr. 34 for Order).

Plaintiff amended Count Two (Tr. 38) and defendant Beardall filed Motion to Strike the amendment and for more definite statement and Motion to Dismiss Count Two (Tr. 41, 42 and 43 respectively). The Court struck the amendment and entered an order dismissing the Petition and a final judgment thereon (Tr. 45, 46 and 47 respectively).

On an appeal to the Circuit Court of Appeals when the case came on for a hearing October 7th, at Atlanta, Georgia, the Court dismissed the cause of its own motion without opinion (Tr. 55).

Plaintiff and Respondent, by counsel, filed petition for re-hearing on October 22, 1941, and this was denied December 5, 1941. Certiorari was granted.

QUESTION INVOLVED.

When a complaint states several separate and distinct causes of action and the final judgment is entered on one in the District Court, is not the aggrieved party entitled to an appeal or required to take an appeal within the statutory time allowed from the judgment on such separate causes of action?

ARGUMENT.

From the brief statement herein, and an examination of parts of the record referred to, there is disclosed three separate and distinct causes of action which, under the old procedure prior to the adoption and effective date of the Federal Rules of Civil Procedure, could not have been combined in any one single action.

These rules have made a radical departure in many particulars and we will refer to those pertinent directly and by analogy.

Rule No. 2 provides:

> "There shall be one form of action to be known as civil action."

And Rule 1 provides that the rule shall govern all procedure in the District Courts of the United States in all suits of a civil nature whether cognizable as cases at law or in equity with the exceptions stated in Rule 81.

By Rule 3 an action is commenced by filing a complaint with the Court.

Then we turn to Rule 18 and we find this:

> "(a) Joinder of Claims. The plaintiff in his complaint or in a reply setting forth a counterclaim and the defendant in an answer setting forth a counterclaim may join either as independent or as alternate claims as many claims either legal or equitable or both as he may have against an opposing party. There may be a like joinder of claims when there are multiple parties if the requirements of Rules 19, 20, and 22 are satisfied. There may be a like joinder of crossclaims or third-party claims if the requirements of Rules 13 and 14 respectively are satisfied."

These matters are directly on the point.

Further illustration by the rules, we have Rule 20 thus:

> "(a) Permissive Joinder. All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any questions of law or fact common to all of them will arise in the action. All persons may be joined in one action as defendants if there is asserted against them jointly, severally, or, in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all of them will arise in the action. A plaintiff or defendant need not be interested in obtaining or defending against all the relief demanded. Judgment may be given for one or more of the plaintiffs according to their respective rights to relief, and against one or more defendants according to their respective liabilities."

Therefore, by virtue of Rule 18 and by virtue of that rule only could the causes of action in this suit have been joined. Then we turn to Rule 54 under the subject of judgment and we find this under B of that rule;

> "(b) Judgment at Various Stages. When more than one claim for relief is presented in an action, the court at any stage, upon a determination of the issues material to a particular claim and all counterclaims arising out of the transaction or occurrence, which is the subject matter of the claim, may enter a judgment disposing of such claim. The judgment shall terminate the action with respect to the claim so disposed of and the action shall proceed as to the remaining claims. In case a separate judgment is so entered, the court by order may stay its enforcement until the entering of a subsequent judgment or judgments and may prescribe such conditions as are necessary to secure the benefit thereof to the party in whose favor the judgment is entered."

We now turn to the statute on time for making application for appeal or writ of error:

"Section 230. Time for making application for appeal or writ of error. No writ of error or appeal intended to bring any judgment or decree before a circuit court of appeals for review shall be allowed unless application therefor be duly made within three months after the entry of such judgment or decree (Mar. 3, 1891, Ch. 517, Sec. 11, 26 Stat. 829; Feb. 13, 1925, Ch. 229, Sec. 8 (c), 43 Stat. 940)."

28 U. S. C. A., Sec. 230.

The Appellate jurisdiction in matters of this kind is covered by the following statute:

"Section 225 (Judicial Code, Sec. 128 amended).

Appellate jurisdiction—

(a) Review of final decisions. The circuit courts of appeal shall have appellate jurisdiction to review by appeal or writ of error final decisions—

First. In the district courts, in all cases save where a direct review of the decision may be had in the Supreme Court under section 345 of this title."

Tit. 28, U. S. C. A., Sec. 225.

Rule 73 of the Rules of Civil Procedure provide for procedure "when an appeal is permitted by law from a District Court to the Circuit Court of Appeals and within the time prescribed, a party may appeal from a judgment by filing with the District Court a notice of appeal."

The time for taking an appeal is mandatory and jurisdictional and cannot be extended by waiver, consent or order of court.

Robertson v. *Morganton Full Fashion Hosiery, Co.*, 95 F. 2d 780.

The rule is so universal we feel it would be an insult to the court to cite authorities for this proposition.

It is noted from the transcript of record in this case, page 55, that the case was dismissed on the ground "that

the appeal sued out in said cause was taken from a judgment that is not final."

When we look at the judgment, transcript 47-48, we find this on top of page 48:

> "It is Ordered and Adjudged that this suit as set out in Count Two of plaintiff's complaint be, and the same is hereby dismissed as to William Beardall as executor of the estate of Susan J. Graham, deceased, and that the plaintiff Susan G. Reeves take nothing by her plaint, and that the defendant William Beardall, as executor of the estate of Susan J. Graham, deceased, as to plaintiff's claim set up in Count Two of her complaint, go hence without day."

Apparently the Circuit Court of Appeals, Fifth Circuit, had in mind its opinion in the case of *Hunteman v. New Orleans Public Service, Inc., et al.*, 119 F. 2d 465, where it dismissed an unlike case where two parties had been sued in the same count on the same cause of action and it dismissed an appeal because the case hadn't been finally disposed of as to the other parties. This case was not brought nor governed by Rules 18 and 54 or any other rules of Civil Procedure as to joinder of parties, cause of actions or the entry of final judgment.

We have referred to Rule 20 by analogy and for the purpose of calling to the court's attention the extensive revoluntionary changes in the procedure, all of which the Court knows. It will be noted that Rule 20 provides that judgment may be given to one or more of the plaintiffs according to their respective rights to relief and against one or more of the defendants according to their liabilities, this taken in connection with Rule 54 quoted above shows a plain intention in the adoption of these rules of Civil Procedure to provide for the hasty ending of independent litigation both as to causes of action and parties in causes of action by providing for just such thing as was done in this case before the court, that is, the entry of a final judgment on a separate and distinct cause of action

as to any party which entirely determines as to all parties interested in the particular final judgment on the particular cause of action that this ends the action as to that particular claim and party or parties, and to appeal is not only allowable but is required to be taken within the ninety days specified in the statute above quoted, Sec. 230, Tit. 28, U. S. C. A.

Otherwise the rules themselves would belie the very purpose expressed in Rule No. 1: They shall be construed to secure the just, speedy and inexpensive determination of every action.

We now come to the meaning of the word judgment as used in Rule 54 and the other Federal Rules.

We find this defined in Rule 54, Subdivision A thus:

> "Judgment as used in these rules includes a decree and any order from which an appeal lies."

Therefore, when we apply this definition to Subdivision B of Rule 54 and we find the provision for the Court to determine as to all the issues material to a particular claim and for the entry of judgment disposing of such claim, and where the rules say the judgment shall terminate the action with respect to the claim so disposed of, then it is perfectly plain that this definition, and the application of same to Subdivision B, clearly brings the appeal in this case to the Circuit Court of Appeals within Sec. 225, Tit. 28, U. S. C. A., quoted above, wherein it is provided for appeals to review "final decisions" as the definition particularly says that it includes any order from which an appeal lies, and certainly the judgment in the case at bar was an order, and a final order, and a final decision of the court as to claim asserted in Count Two.

The definition of the word judgment and as understood in common parlance means a final judgment.

1 Freeman on Judgments, Fifth Edition, Section 2, pages 3, 4, and 5.

Precedence under the rules of civil procedure of course would appear only in the decisions of the Federal Court, including this court and we find nothing from this Court.

In addition to the citations in brief of Petitioner, we find this case:

Karl Kiefer Mach. Co. v. *U. S. Bottlers Machinery Company*, (7th Circuit) 108 F. 2d 469.

This case held that where a suit was filed on two separate claims based on two separate patents and final judgment was entered dismissing as to one of the claims, that this judgment was appealable under Section 128 of the Judicial Code as amended, 28 U. S. C. A. 225, authorizing appeals from final decisions, the Court holding that final decisions mean the same thing as final judgments and decrees. Of course as we understand it citing cases decided by the Circuit Courts of Appeals on this proposition might or might not be precedent, depending on whether or not this Court agrees with the particular decisions.

In this case counsel for respondent was convinced at the time the Circuit Court of Appeals dismissed this action of its own motion that it was in error in doing so, and therefore joined in a petition for rehearing and filed herein on petition for certiorari a brief in support thereof instead of against the granting of same. Counsel for respondent is still of the opinion and belief from the application of the rules of civil procedure as herein set out that the Circuit Court of Appeals was in error in dismissing the action and it is convinced that the decision of the District Court in Count Two was appealable under the statutes and rules of Civil Procedure referred to herein.

This raises a peculiar situation in the matter of taxing costs where the Circuit Court of Appeals has dismissed a case over the protest of parties on both sides. If the Court reverses the case it does not appear appro-

priate to charge the costs to the respondent, nor *vice versa*.

All of which is respectfully submitted.

CHARLES P. DICKINSON,
P. O. Box 752, Metcalf Building,
Orlando, Florida,
Attorney for Respondent.

SUPREME COURT OF THE UNITED STATES.

No. 841.—October Term, 1941.

Susan G. Reeves, Petitioner, *vs.* William Beardall, as Executor of the Last Will and Testament of Susan J. Graham, Deceased.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

[May 11, 1942.]

Mr. Justice Douglas delivered the opinion of the Court.

The sole question presented by this case is whether the Circuit Court of Appeals committed error in dismissing the appeal from the District Court on the ground that the judgment in question was "not final".

The jurisdiction of the District Court was invoked on the basis of diversity of citizenship. The complaint contained three counts. Count I contained a claim on a promissory note executed by respondent's decedent. Count II contained a claim on an alleged contract between petitioner and respondent's decedent whereby the latter agreed not to change her will in consideration of petitioner's return of certain securities and petitioner's agreement not to press for payment of the note. Specific performance or in the alternative damages equal to the net value of the estate was sought. Count III contained a claim against one Hamer who was alleged to hold certain assets of decedent to which petitioner was entitled by reason of the contract on which Count II was based. The prayer was for an accounting against Hamer. Respondent moved to dismiss Counts II and III. The motion was granted with permission to the petitioner to amend. Counts II and III were amended in respects not material here. Respondent then moved to dismiss Count II. Petitioner having announced that she did not desire to amend, the court granted the motion and ordered that "final judgment" be entered on Count II in favor of respondent. An appeal to the Circuit Court of Appeals was dismissed without opinion on the ground that it "was taken from a judgment that is not final". We granted

the petition for certiorari because of an apparent conflict between that decision and such cases from other circuits as *Collins* v. *Metro-Goldwyn Pictures Corp.*, 106 F. 2d 83.

In this type of case the Circuit Court of Appeals has appellate jurisdiction to review by appeal only "final decisions". Judicial Code § 128, 28 U. S. C. § 225. The Rules of Civil Procedure provide: "When more than one claim for relief is presented in an action, the court at any stage, upon a determination of the issues material to a particular claim and all counterclaims arising out of the transaction or occurrence which is the subject matter of the claim, may enter a judgment disposing of such claim. The judgment shall terminate the action with respect to the claim so disposed of and the action shall proceed as to the remaining claims. In case a separate judgment is so entered, the court by order may stay its enforcement until the entering of a subsequent judgment or judgments and may prescribe such conditions as are necessary to secure the benefit thereof to the party in whose favor the judgment is entered." Rule 54(b). That rule, the joinder provisions (see Rules 13, 14, 18, 20) and the provision of Rule 42 which permits the court to order a separate trial of any separate claim or issue indicate a "definite policy" (*Collins* v. *Metro-Goldwyn Pictures Corp.*, *supra*, p. 85) to permit the entry of separate judgments where the claims are "entirely distinct". 3 Moore, Federal Practice, Cum. Supp. 1941, p. 96. Such a separate judgment will frequently be a final judgment and appealable, though no disposition has been made of the other claims in the action. *Bowles* v. *Commercial Casualty Ins. Co.*, 107 F. 2d 169, 170. That result promotes the policy of the Rules in expediting appeals from judgments which "terminate the action with respect to the claim so disposed of", though the trial court has not finished with the rest of the litigation. See Federal Rules of Civil Procedure, Proceedings of Institutes, Washington & New York (1938), p. 329.

The Rules make it clear that it is "differing occurrences or transactions, which form the basis of separate units of judicial action." *Atwater* v. *North American Coal Corp.*, 111 F. 2d 125, 126. And see Moore, *op. cit.*, 92-101; 49 Yale L. Journ. 1476. If a judgment has been entered which terminates the action with respect to such a claim, it is final for purposes of appeal under § 128 of the Judicial Code. The judgment here in question meets that test. The claim against respondent on the promissory note

was unrelated to the claim on the contract not to change the will. Those two claims arose out of wholly separate and distinct transactions or engagements. And the question as to Hamer's liability to account to petitioner would arise only in the event that the claim on the contract not to change the will was sustained. Hence no question is presented here as respects the appealability of a judgment dismissing a complaint as to one of several defendants alleged to be jointly liable on the same claim. See *Hunteman* v. *New Orleans Public Service, Inc.*, 119 F. 2d 465. After the entry of the judgment on Count II, the claim based on the contract not to change the will was terminated and could not be affected by any action which the Court might take as respects the remaining claims. Nothing remained to be done except appeal.

The judgment therefore was final.

Reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.